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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,

Petitioner,

VS.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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25 pp

QUESTION PRESENTED

Dissatisfied with the Petitioner's presentation of the question presented, Respondents state the question as follows:

I. Whether a federal district court has jurisdiction to enjoin a State non-property tax which is admittedly discriminatory and which "results in discriminatory treatment of a common carrier by rail" within the meaning of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976?

II. Whether the courts below erred in holding that Petitioners, who are themselves not common carriers by railroad, can invoke the protections of Section 306(1)(d)?

LIST OF PARTIES TO THIS PROCEEDING

The Petitioner is the Director of the Department of Revenue of the State of Iowa (referred to hereinafter as the "Director").

Respondents are Trailer Train Company, Railbox Company and Railgon Company (referred to hereinafter as the "Carlines"). Railbox and Railgon are wholly-owned subsidiaries of Trailer Train Company, a Delaware corporation whose shareholders are listed in Appendix A to this brief.

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Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. § 11503 ..... *passim*

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (reprinted in Appendix B to the Petition) is reported at 765 F.2d 744. The opinion of the United States District Court for the Southern District of Iowa, dated November 21, 1984 (reprinted in Appendix A to the Petition) is unreported.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. § 11503.

The language of 49 U.S.C. § 11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, § 3(2), 92 Stat. 1466 (1978). In previous decisions under 49 U.S.C. § 11503, courts of appeal have referred to the language of Section 306 rather than to the language of the codification in resolving issues of statutory construction. *See, e.g., Ogilvie v. State Board of Equalization of the State of North Dakota*, 657 F.2d 204, 206, n. 1 (8th Cir. 1981); *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 640 F.2d 255, 257-58 (10th Cir. 1983). Accordingly, the Carlines will refer to the language of Section 306 in this Response. Section 306 is reprinted in Appendix B to this brief; the provisions of 49 U.S.C. § 11503 are reprinted in Appendix C to this brief.

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the Director's Statement of the Case, the Carlines adopt as their counterstatement the district court's description of the case as set forth in Appendix A to the Petition, pp. App. 1 through App. 7. The Carlines also wish to emphasize certain facts which were entirely omitted from the Director's Statement:

a. Supplementary Statement of Facts With Regard To The Nature of The Iowa Railway Mileage Tax

By the Director's own admission, the Iowa Railway Mileage Tax is discriminatory. (Appendix to Petition, App.

7, ¶ 17.) It is imposed solely upon those persons or entities who furnish rail cars for use in railroad operations in Iowa. No other commercial or industrial taxpayer within the State is subject to the Iowa Railway Mileage Tax, or to any similar tax. Enacted in 1978 (shortly before the effective date of Section 306), the Iowa Railway Mileage Tax replaced the ad valorem tax that had been imposed historically upon the value of the Carlines' cars and exacted a charge of one and one quarter cents for each "loaded mile" traveled by freightline and equipment car companies throughout the state. In the first year that the Iowa Railway Mileage Tax was imposed, Trailer Train Company's tax liability to the State of Iowa exceeded $1,000,000; Trailer Train Company's total tax liability for the previous year under the property tax was only about $31,000. Appendix A to the Petition, App. 6 through App. 7.

b. Supplementary Statement of Facts With Regard To The Course Of Proceedings

The precise jurisdictional question raised by the Director before this Court, i.e., whether the Tax Injunction Act[1] precludes the exercise of federal injunctive power in this case, was not raised before the district court nor briefed before the Court of Appeals. The Director first raised this issue during oral argument before the Court of Appeals. Following the issuance of the Eighth Circuit's opinion (which does not address the jurisdictional question), the Director petitioned for rehearing and attempted once more to argue that § 1341 barred the exercise of federal jurisdiction. The Court of Appeals denied the Director's petition without comment.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 17 of the Rules of this Court.

[1]28 U.S.C. § 1341.

The Carlines respectfully submit that the Petition should be denied.

1. **No Conflict Exists Among The Circuit Courts, Or Between The Decisions Below And The Decisions Of This Court, With Respect To The "Jurisdictional Issue" Presented For Review.**

The Director urges that it was error for the district court to issue a permanent injunction prohibiting the collection of Iowa Railway Mileage Taxes from the Carlines in this case. The Director contends that, even if the Carlines have a federal *right* to attack discriminatory nonproperty taxes under Section 306(1)(d), they do not have federal injunctive or declaratory *remedies* available to them because of the Tax Injunction Act, 28 U.S.C. § 1341, and the five percent limitation of Section 306(2)(c). Petition, pp. 5, 6. The Director does not identify any conflict among the circuits on this issue; he simply argues the question on its merits.[2]

Section 306(2) expressly confers jurisdiction upon United States district courts to prevent violations of Section 306

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[2]As noted in the Carlines' Counterstatement of the Case, the Director raised this issue for the first time during oral argument before the Court of Appeals. This Court has long held that questions presented in a petition for certiorari must properly arise in the record and have been urged and briefed below. *Tyrrel v. District of Columbia*, 243 U. S. 1 (1917). Only in exceptional circumstances, none of which is present here, will this Court consider issues not pressed or passed upon below. *Adickes v. S. H. Kress and Co.*, 398 U. S. 144, 147 n. 2 (1970). Although this Court will occasionally consider "jurisdictional issues" whether raised below or not, *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956), this Court should refrain from deciding such questions without the benefit of a lower court's opinion. It should be noted, further, that the Director has raised the precise jurisdictional issue presented here in a Section 306 case which is now pending before the same district court that decided this case and which involves the same tax. *ACF Industries, Incorporated, et al. v. Gerald D. Bair*, No. 85-385-A (S.D. Iowa).

notwithstanding 28 U.S.C. § 1341, and without regard to amount in controversy. [Emphasis added.] Section 306(2)(c) states that no relief may be granted under Section 306(2) unless:

> [T]he ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

Contrary to the Director's assertions, the five percent limitation of Section 306(2)(c) does *not* reinstate the jurisdictional bar of § 1341. By its terms, the five percent limitation applies only to cases of assessment ratio discrimination and is inapplicable in Section 306(1)(d) cases involving non-property taxes. The five percent limitation was intended by Congress merely to establish a jurisdictional threshold that would preclude taxpayers from obtaining relief in cases of *de minimus* assessment ratio discrimination. *See Louisville & Nashville R. R. v. Louisiana Tax Commission*, 498 F. Supp. 418, 423 (M.D. La. 1980).

Every court that has considered the Director's "jurisdictional" argument has rejected it. *Trailer Train Company v. State Board of Equalization*, 697 F.2d 860, 865-66 (9th Cir. 1983) and *Burlington Northern R. R. v. Bair*, 584 F. Supp. 1229, 1235 (S.D. Iowa 1984), hold expressly that Section 306(2)(c) does *not* limit federal jurisdiction, or the exercise of federal injunctive relief, where the discrimination of which the taxpayer complains takes a form other than assessment ratio discrimination. As stated in *Trailer Train, supra:*

> Given the basic concerns motivating Congress' enactment of §11503, Congress could not have intended that the statute be construed as authorizing the district

> court to enjoin a tax-rate discrimination only when it is accompanied by an assessment-ratio discrimination. Such a literal reading of §11503 ignores Congress' recognition that discriminatory taxation of carriers can result from *either* assessment-ratio or tax-rate discrimination. It also undermines Congress' intent to provide discrimination victims with an injunctive federal-court remedy by placing arbitrary limits on those who could apply for such relief.

697 F.2d at 866. No federal court has construed Section 306(2)(c), or § 1341, as a limitation upon federal jurisdiction or upon the power of the federal courts to fashion appropriate injunctive or declaratory remedies in Section 306(1)(d) cases.

The Director's "jurisdictional" argument is merely a variation of a statutory construction argument that the Director has urged repeatedly and unsuccessfully, i.e., that Section 306 prohibits *only* discriminatory state property taxation and has no applicability to other forms of discriminatory state taxation. This interpretation of Section 306 is belied by the language of the Act itself and has been rejected by every court to address the issue.

Sections 306(1)(a), (b), and (c) prohibit states from assessing, levying or collecting ad valorem taxes based upon discriminatory assessment ratios or tax rates. Section 306(1)(d), which is the focus of this litigation, forbids:

> The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to the jurisdiction of the [Interstate Commerce Act].

Every circuit court that has interpreted this statutory language has held that it means precisely what it says, i.e.,

that *all* forms of state taxation which result in discriminatory treatment of a common carrier by rail are encompassed and prohibited. *Alabama Great Southern R. R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); *Richmond, Fredericksburg & Potomac R. R. v. Commonwealth of Virginia*, 762 F.2d 375 (4th Cir. 1985). *See also Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983) (railroad diesel fuel taxes subject to scrutiny under Section 306); *Kansas City Southern Ry. v. McNamara*, 563 F. Supp. 199 (M.D. La. 1983) (gross receipts taxes); *Atchison, Topeka & Santa Fe Ry. v. Bair*, 535 F. Supp. 68 (S.D. Iowa 1982) (railroad diesel fuel taxes); and *Cheseapeake & Ohio Ry. v. Rose*, No. 82-2564, Memorandum Order (S.D. W.Va., August 22, 1983) (net and gross income taxes).

Both of the courts below concluded that, because of the close functional relationship between the Carlines and common carriers by rail, imposition of the Iowa Railway Mileage Tax upon the Carlines "results in discriminatory treatment of a common carrier by rail" within the meaning of Section 306(1)(d). This interpretation is wholly consistent with federal decisions that have held that Section 306 is intended to prohibit discriminatory state taxation of the railroad industry "in all of its guises," *Southern Railway v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), and "in any form whatsoever." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981). *See also Burlington Northern R. R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *Louisville and Nashville R. R. v. Department of Revenue of the State of Florida*, 736 F.2d 1495 (11th Cir. 1985).

Thus, not only is there no conflict with respect to the "jurisdictional" issue presented for review, the Director's arguments on this issue are meritless.

2. No Conflict Exists Among The Circuit Courts, Or Between The Decisions Below And The Decisions Of This Court, On The Issue Of Whether Carlines Are Entitled To The Protections Of Section 306.

The Director relies upon *Trailer Train Co. v. State Board of Equalization of the State of California*, 538 F. Supp. 509 (N.D. Cal. 1982) ("*Trailer Train California*"), for the proposition that "the lower federal courts are split" on the issue of whether private rail car companies are entitled to the protections of Section 306(1)(d). Petition, p. 8. The Director's reliance on *Trailer Train California* is misplaced for two reasons.

First, Rule 17 of the Rules of this Court expressly requires a conflict among the *circuit* courts of the United States, not among the federal district courts. Every *circuit* court that has considered the issue has held correctly that private rail car companies are entitled to the full protections of Section 306. *Trailer Train v. State Board of Equalization of the State of North Dakota*, 710 F.2d 468 (8th Cir. 1983); *General American Transportation Corp. v. Louisiana Tax Commission*, 680 F.2d 400 (5th Cir. 1982).

Second, *Trailer Train California* is not a final decision. *Trailer Train California* was decided upon application for preliminary injunction; the case is still pending before the trial court and no interlocutory appeal has been taken. Therefore, the district court's conclusions in *Trailer Train California* are preliminary, subject to change by the district court at any time prior to the issuance of its final decision, and should not be relied upon as indicative of a "split" among the lower federal courts.[3] *See, e.g., Rittmiller v. Blex Oil,*

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[3]*Trailer Train California* was fully considered and rejected by the Eighth Circuit in *Trailer Train Company v. State Board of Equalizaion of the State of North Dakota*, 710 F.2d 468, 471 (8th Cir. 1983), notwithstanding the submission of an amicus brief by the State of California supporting the California court's interpretation.

Inc., 624 F.2d 857, 863 n. 6 (8th Cir. 1980); *Berrigan v. Sigler*, 499 F.2d 514 (D.C. Cir. 1974).

In short, the putative "conflict" discussed in part C of the Director's petition simply does not exist.

3. No Special Or Important Reasons Exist For Granting The Writ.

The Director contends that this case is important because the decision below interferes with the states' ability to administer their tax systems. The Director complains that "an expansive reading of [Section 306] threatens the revenue systems of many states," and that if Section 306 "is held to authorize federal injunctive relief in cases of nonproperty taxes, the tax structure of many states will be impaired." The Director warns that "state excise taxes imposed on rail carriers are potentially endangered." Petition, p. 8. These contentions are illogical, overstated and irrelevant.

Although the Director admits that the Iowa Railway Mileage Tax is discriminatory and illegal, his principal argument before this Court is that federal courts should not be permitted to enjoin collection of the tax and that the Carlines should be relegated to state court. According to the Director, it is the exercise of federal jurisdiction which "impairs" and "threatens" the states. Petition, p. 7. If, however, state courts can be relied upon to "fully [protect] whatever rights taxpayers may have under § 306" (as the Director asserts, Petition, p. 7), then the consequences that will flow from such state court action (i.e., "impairment" of tax structures and "endangerment" of excise taxes) will be no different from the consequences that will flow from the exercise of federal jurisdiction. The dire consequences that the Director hypothesizes are, therefore, no reason for declining or restricting federal jurisdiction.

The Director's predictions of "impairment" and "endangerment" are also grossly exaggerated. Nothing in the

record of this case even remotely suggests that the elimination of the Iowa Railway Mileage Tax "threatens" Iowa's revenue system. The State of Iowa remains free to structure its tax system in any form it chooses, so long as the taxes that it imposes on the railroad industry are not discriminatory within the meaning of Section 306.

Finally, "impairment" of state tax systems is an irrelevant consideration in Section 306 cases. During the course of congressional deliberations leading to the passage of Section 306, Congress fully considered the effects that anti-discrimination legislation would have upon state finances. *See, e.g.*, S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969). Congress concluded that national interests, e.g., revitalization of the nation's railroad system and elimination of economic burdens resulting from discriminatory state taxation, must prevail over the parochial interests of the states in maintaining discriminatory tax systems. In enacting Section 306, Congress intended to eliminate state taxing schemes and practices that discriminate against the railroad industry; Congress gave the states three years within which to bring their statutes and practices into conformity with the Act. *See Southern Railway Co. v. State Board of Equalization*, 715 F.2d 522, 523 n. 1 (11th Cir. 1983).

As recognized by this Court in *Aloha Airlines v. Director of Taxation of Hawaii*, ____ U.S. ____, 104 S. Ct. 291, 295. n. 10 (1983), "impairment" and "disruption" of state finances are inevitable consequences of congressional regulation of state taxation. Since disruption of state finances was plainly anticipated and intended by Congress, such disruption cannot be used as a reason for narrowly construing the Court's jurisdiction under Section 306 and restricting federal injunctive powers under the Act.

CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The courts below applied this statute precisely as it is written and with the results intended by Congress. The petition does not present any ground for granting certiorari within the meaning of Rule 17 of the Rules of this Court and should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

SHAREHOLDERS IN TRAILER TRAIN COMPANY

ATCHISON, TOPEKA & SANTA FE RY CO
BOSTON & MAINE CORPORATION
CENTRAL OF GEORGIA RR CO
CHICAGO & NORTH WESTERN TRANS CO
CONSOLIDATED RAIL CORPORATION
DENVER & RIO GRANDE WESTERN RR CO
GRAND TRUNK WESTERN RR CO
KANSAS CITY SOUTHERN RY CO
MISSOURI-KANSAS-TEXAS RR CO
NORFOLK & WESTERN RY CO
READING CO
RICHMOND, FREDERICKSBURG & POTOMAC RR CO
SOUTHERN PACIFIC TRANS CO
UNION PACIFIC RR CO
BALTIMORE & OHIO RR CO
BURLINGTON NORTHERN RR CO
CHESAPEAKE & OHIO RY CO
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
(RICHARD B. OGILIVIE, TRUSTEE)
FLORIDA EAST COAST RY CO
ILLINOIS CENTRAL GULF RR CO
LOUISVILLE & NASHVILLE RR CO
MISSOURI PACIFIC RR CO
NORFOLK & WESTERN RY CO, LESSEE OF
WABASH RR CO
ST. LOUIS SOUTHWESTERN RY CO
SOUTHERN RAILWAY CO
WESTERN MARYLAND RY CO

APPENDIX B

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as

may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property

at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term-

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c)"commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

APPENDIX C

§ 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax

rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to the property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.